

SERVED: June 3, 1993

NTSB Order No. EA-3843

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 16th day of March, 1993

_____	)	
JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-12464
v.	)	
	)	
NORMAN DE BACK,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, which was issued at the conclusion of an evidentiary hearing held in this case on July 8, 1992.<sup>1</sup> In that decision, the law judge found that respondent violated sections 91.75(b), 91.87(h) and 91.9 of the

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<sup>1</sup> Attached is an excerpt from the hearing transcript containing the law judge's oral initial decision and the comments that are incorporated in it by reference.

Federal Aviation Regulations (FAR)<sup>2</sup> when he departed from Stapleton International Airport without a takeoff clearance. However, the law judge reduced the sanction from a 60-day suspension of respondent's airline transport pilot certificate, as set forth in the Administrator's order of suspension (complaint), to one of 45 days. The Administrator has not appealed from the reduction in sanction. As discussed below, we deny respondent's appeal.

It is undisputed that, on June 30, 1989, respondent was pilot in command of a Boeing 727 being operated as United Flight 286 from Denver, Colorado, to Omaha, Nebraska. He had assigned

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<sup>2</sup> Section 91.75(b) [now § 91.123(b)] provided:

**§ 91.75 Compliance with ATC clearances and instructions.**

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

Section 91.87(h) [now § 91.129(i)] provided, in pertinent part:

**§ 91.87 Operation at airports with operating control towers.**

(h) **Clearances required.** No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC.

Section 91.9 [now § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

his first officer, Curtis Kekoa, to fly that leg of the flight, but because the nosewheel tiller is on respondent's side, he taxied the aircraft into position on Runway 35 Right (pursuant to an air traffic control (ATC) instruction to do so) while First Officer Kekoa handled the radios. Once he had positioned the aircraft on the runway, respondent set the parking brake and turned the controls over to First Officer Kekoa. Respondent assumed the duties of handling radio communications with ATC, and the crew waited for their takeoff clearance.

It is undisputed that the tape of ATC radio communications transmitted during the relevant time period<sup>3</sup> contains no clearance for Flight 286 to take off, but respondent testified that he believed he heard a takeoff clearance for his aircraft.<sup>4</sup>

Although respondent testified that he acknowledged the takeoff clearance he thought had been issued to his flight, he agreed that the ATC tape does not contain any such acknowledgment. (Tr. 35.) Respondent stated that he confirmed his understanding with First Officer Kekoa, who agreed they were cleared and proceeded to take off. (Tr. 31.) The second officer testified that he

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<sup>3</sup> Neither the tape of ATC communications nor a transcript of its contents was introduced into evidence in this case. However, the record indicates that respondent, the second officer, and the air traffic controller who was handling the flight (all of whom testified at the hearing) listened to the tape and essentially agree on what it contains.

<sup>4</sup> The air traffic controller who was handling departures at the time testified that he cleared another United aircraft (Flight 298) to take off from Runway 35 Left shortly before respondent's aircraft (Flight 286) took off from Runway 35 Right without a clearance. (Tr. 15.)

heard a conversation between respondent and First Officer Kekoa wherein one of them questioned the other as to whether a takeoff clearance had been issued to their flight. Although he does not remember who asked the question and who answered it, he recalls that they ultimately determined a clearance had been issued.

(Tr. 40-1.)

After Flight 286 took off without a clearance, the controller took immediate action to establish proper separation between respondent's aircraft and two others which had just taken off. (Tr. 12-3.) Both respondent and the second officer testified that after they were airborne they heard something on the radio about an aircraft taking off without a clearance, but that they did not believe it was a reference to their aircraft. (Tr. 36-7, 45.)

On appeal, respondent argues that the violations should be dismissed against him or, in the alternative, that no sanction should be imposed, because the FAA failed to provide him with timely notice of the suspected violation thereby depriving him of the opportunity to prepare a full defense, citing Administrator v. Brasher, 5 NTSB 2116 (1987). He also asserts that his violations should be excused because he reasonably relied on his first officer's statement to him that they were cleared to take off. In reply, the Administrator states that the limited notice requirement discussed in Brasher does not apply to this type of situation, and that, furthermore, respondent's asserted reliance on his first officer was unreasonable. For the reasons discussed

below, we deny respondent's appeal and affirm the initial decision.

Respondent was apparently not notified of the possibility of this enforcement action until approximately four months after the incident occurred. (Tr. 32.) However, contrary to respondent's assertions, the controller in this case was under no duty to immediately and directly<sup>5</sup> inform him that he had taken off without a clearance. In Administrator v. Brasher, 5 NTSB 2116 (1987), we held that the FAA's failure to comply with its policy of immediately notifying pilots of certain deviations (contained in FAA Notice N7210.251) could justify the imposition of no sanction for the resulting violation. Cf. Administrator v. Ridpath, NTSB Order No. EA-3068 (1990) (FAA's failure to comply with notice requirement is not a basis for dismissal of charges).

However, that notice requirement applies only to deviations from altitude or separation instructions<sup>6</sup> (not to deviations from takeoff clearances), and on its face is directed only to controllers working at Air Route Traffic Control Centers (not to tower controllers)<sup>7</sup>.

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<sup>5</sup> We note that the controller apparently said something (although not specifically directed at respondent's aircraft) about an aircraft taking off without a clearance, which both respondent and the second officer admitted hearing over the frequency soon after they were airborne.

<sup>6</sup> Administrator v. Brauser, NTSB Order No. EA-2940, rec. den., NTSB Order No. EA-2983 (1989); Administrator v. Scroggins, NTSB Order No. EA-3466 (1992).

<sup>7</sup> See the relevant text of the Notice, quoted in Brasher, at 2116.

Nor was the inspector in this case derelict in his duty of informing respondent of the investigation into this incident. He stated, and respondent has not disputed, that it took United Airlines three months to respond to his letter requesting the names of the crewmembers on this flight. (Tr. 20.) While we recognize that earlier notification in this case might have enabled the crew to better recall the facts surrounding the incident, we are satisfied that the law judge took that fact into account when he mentioned the time lapse between the incident and the notification as one reason why he was reducing the sanction.<sup>8</sup>

(Tr. 71.) We cannot agree that the timing of the Administrator's notice in this case (which did not violate our six-month "stale complaint" rule, see 49 C.F.R. 821.33) was so late as to warrant dismissal of the charges or any further reduction in sanction than that already ordered by the law judge.

Finally, we find that any reliance respondent placed on First Officer Kekoa's "confirmation" that they had received a takeoff clearance does not excuse his violations. As the law judge noted in his initial decision (Tr. 66-7), at the time of the alleged reliance respondent was responsible for handling radio communications with ATC. Respondent admitted that, other than "check[ing] with the second officer . . . to make sure his duties were completed," monitoring the radios was his primary

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<sup>8</sup> In this sense, this case is like Administrator v. Jones, NTSB Order No. EA-3154 (1990), where the law judge also reduced the sanction based in part on the FAA's delayed notification. Respondent's citation of that case as support for elimination of sanction is not well taken.

duty. (Tr. 36-7.) This is not, therefore, like any of the cases cited in respondent's brief<sup>9</sup> where we held that a pilot could justifiably rely on the statement of another pilot regarding an ATC transmission, because the pilot upon whom reliance was placed in each of those cases was the pilot whose duty it was to handle radio communications.

We agree with the law judge that respondent should have resolved his question as to whether or not his aircraft had been issued a takeoff clearance by contacting ATC. (Tr. 67-8.) In this regard, we must observe as a general matter that this crew's failure to seek ATC verification of their apparent belief that they were cleared for takeoff, compounded by respondent's failure to acknowledge the clearance he thought he had received (which denied ATC the opportunity to immediately correct respondent's mistaken belief), indicate to us a lack of care in the cockpit of an air carrier flight. That lapse is, we think, all the more disturbing because it occurred at an airport actively using parallel runways for takeoffs, a circumstance that obviously dictates heightened vigilance on the part of pilots to avoid acting on a clearance intended for another aircraft.

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<sup>9</sup> Administrator v. Coleman, 1 NTSB 229 (1968); Administrator v. Thomas, 3 NTSB 349 (1977); Administrator v. Crawford, 5 NTSB 1000 (1986); Administrator v. Leenerts, NTSB Order No. EA-2845 (1988).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 45-day suspension of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.<sup>10</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup> For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).